Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

STATE OF OHIO,

Petitioner,

vs.

TROY MATTHEW TENACE,

Respondent.

Petition for Writ of Certiorari to the

Court of Appeals of Lucas County, Ohio

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

QUESTION NO. 1: Is a criminal defendant's plea of "not guilty by reason of insanity" a matter personal to the defendant which cannot be withdrawn by counsel for the accused over the objection of the defendant, or in the nature of an affirmative defense that can be withdrawn by a defendant's counsel and replaced by a straight plea of "not guilty" if the counsel, in the exercise of sound trial strategy, determines that such action represents the best interest of the defendant?

QUESTION NO. 2: Assuming that it is error for a trial court to accept the withdrawal of a criminal defendant's plea of "not guilty by reason of insanity" if offered by defense counsel, but with an affirmative objection on the record by the defendant, can such error be harmless error if there is insufficient evidence of record to support a defense of "not guilty by reason of insanity" and sufficient evidence exists to support the guilty verdict against the accused?

QUESTION NO. 3: Does a disagreement between a defendant and the defendant's trial counsel concerning trial strategy, including whether or not to maintain a defense

based on insanity, necessarily result in a breakdown of the attorney-client relationship of such a magnitude that continued representation of the defendant by the same counsel constitutes ineffective assistance of counsel?

TABLE OF CONTENTS

PAGE

Questions Presented. i

Table Of Authorities iv

Opinions Below 1

Statement Of Jurisdiction 3

Constitutional Provisions And Statutes Involved 3

Statement Of The Case 4

Reasons For Granting The Writ 13

Question No. 1 13

Question No. 2 21

Question No. 3 24

Conclusion 26

TABLE OF AUTHORITIES

CASES

PAGE

Alford v. Wainwright, 725 F.2d 1282, 1289, cert. denied, 469 U.S. 956 (1984) 21

People v. Gaines, 25 Cal. Rptr. 448, 375 P.2d 296 (1962) 18

State v. Buchanan, 43 Ohio App.2d 93, 334 N.E.2d 503 (1974) 17

State v. Jackson, 36 Ohio App. 2d 164, 303 N.E.2d 903 (1973) 17

State v. Manago, 38 Ohio St.2d 223, 313 N.E.2d 10 (1974) 18

State v. Nutter, 22 Ohio St.2d 116, 258 N.E.2d 440 (1970) 18

State v. Purcell, 107 Ohio App.3d 501, 669 N.E.2d 60 (1995) 23

State v. Reynolds, 49 Ohio App.3d 27, 550 N.E.2d 490 (1988) 23

State v. Smith, 3 Ohio App.3d 115, 444 N.E.2d 85 (1981) 16, 17, 18

State v. Turner (Sept. 17, 1980), Medina App., unreported, slip op. 15, 16, 22

State v. Wong, 95 Ohio App.3d 39, 641 N.E.2d 1137 (1994) 23

Weber v. Israel, 730 F.2d 499, 507-508 (7th Cir. 1984) . . 20

TABLE OF AUTHORITIES (CONT.)

CONSTITUTIONAL PROVISIONS	PAGE
United States Constitution, Fifth Amendment	3
United States Constitution, Sixth Amendment	4
United States Constitution, Fourteenth Amendment	3,4

MISCELLANEOUS	PAGE
28 U.S.C. §1257	3
A.B.A. Standards Relating to the Administration of Criminal Justice, The Defense Function, Section 5.2 (Approved Draft 1971)	16
Crim. R. 11(A)	18
Crim.R. 11(C)(2)	17
R.C. 2903.01(B)	4
R.C. 2911.01(A)(2)	4
R.C. 2929.04(A)(7)	4

APPENDIX

Appendix A - Opinion and Judgment Entry of the Court of Appeals of Lucas County, Ohio,Sixth Appellate District, (July 25, 1997), unreported. . . . . App. 1

Appendix B - Entry of the Supreme Court of Ohio, filed December 11, 1997. . . . . App. 30

Appendix C - Judgment Entry of the Court of Common Pleas of Lucas County, Ohio, unreported. . . . . App. 31

Appendix D - Reconsideration Entry of the Supreme Court of Ohio, filed January 28, 1997. . . . . App. 35

Appendix E - Constitutional Provisions:

Fifth Amendment. . . . . App. 36

Sixth Amendment. . . . . App. 36

Fourteenth Amendment. . . . . App. 37

Appendix F - State v. Turner, slip op., Court of Appeals for Medina County, Ohio (Sept. 17, 1980), unreported. . . . . App. 40

OPINIONS BELOW

The Court of Common Pleas of Lucas County, Ohio, issued a Judgment Entry, filed on November 30, 1994 and journalized on December 1, 1994, that both memorialized the jury's findings and recommendations in this capital case and imposed, inter alia, a sentence of death on Respondent Troy Matthew Tenace. Specifically, this Judgment Entry memorialized that the cause had been tried by a jury of twelve upon charges against Respondent that he had committed Aggravated Murder, with attendant "principal offender" death penalty specification, during the course of an Aggravated Robbery. The jury found Respondent guilty of both Aggravated Murder, with the specification, and Aggravated Robbery. Following the mitigation phase of trial, the jury recommended the imposition of the death penalty for the Aggravated Murder and specification proven. The trial court, upon review of the evidence and arguments, imposed a sentence of death upon Respondent for the Aggravated Murder, and sentenced Respondent to between ten and twenty-five years imprisonment for the crime of Aggravated Robbery. The trial court's judgment entry is not reported.

Slip op., Case No. CR94-5235. The judgment entry is reproduced as Appendix C to this petition at pages App. 31 through App. 34.

By Opinion and Judgment Entry of July 25, 1997, the Court of Appeals for Lucas County, Ohio, Sixth Appellate District, reversed the judgment of the trial court. Specifically, the appellate court found that the trial court had erred when it allowed Respondent's trial counsel to withdraw his plea of "not guilty by reason of insanity" over Respondent's objection on the record, thereby both infringing a substantial right of the defendant requiring automatic reversal and resulting in a breakdown of the attorney-client relationship of such a magnitude that Respondent was deprived of the effective assistance of counsel. This opinion is also not reported. Slip op., Case No. L-95-010. The opinion is reproduced as Appendix A at pages App. 1 through App. 29.

On December 11, 1997, the Supreme Court of Ohio denied Petitioner leave to appeal. This entry from the Ohio Supreme Court is reproduced as Appendix at page App. 30. On January 28, 1998, the Supreme Court of Ohio denied rehearing (denominated, in Ohio, a denial of Petitioner's

motion for reconsideration) on this matter. That entry from the court is reproduced as Appendix D at page App. 35.

STATEMENT OF JURISDICTION

The Supreme Court of Ohio's Entry denying leave to appeal and dismissing the appeal was entered December 11, 1997, A-22, and its Reconsideration Entry was filed on January 28, 1998, A-23. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257, because, in this case, rights, privileges and immunities were specifically set up and claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the alleged right of a criminal defendant to personally choose and insist on maintaining a plea of "not guilty by reason of insanity" in defense of criminal charges. Accordingly, this case implicates a criminal defendant's due process rights under the Fifth and Fourteenth Amendments of the Constitution of the United States. This case also necessarily involves a determination of the spheres of influence in the relationship between a criminal defendant and his trial counsel, thereby involving a criminal defendant's right to assistance of counsel set forth in

the Sixth Amendment to the Constitution of the United States and made applicable to the states through the Fourteenth Amendment. These Amendments are reproduced as Appendix E at pages App. 36 through App. 39.

STATEMENT OF THE CASE

Respondent Troy Matthew Tenace was charged in a two-count indictment with Aggravated Murder, in violation of R.C. 2903.01(B), and Aggravated Robbery, violative of R.C. 2911.01(A)(2), on February 9, 1994. The aggravated murder count carried a death specification, specifically, R.C. 2929.04(A)(7). Two trial counsel were appointed on February 28, 1994.

On March 10, 1994, a written plea of not guilty by reason of insanity was filed for the defendant in the trial court. The court then referred the defendant to the Court Diagnostic & Treatment Center for reports regarding his competence to stand trial, and regarding a possible plea of not guilty by reason of insanity.

At a hearing on April 25, 1994, the trial court stated that it had received reports from the diagnostic and treatment center. The reports showed that the defendant was competent to stand trial. The trial judge also stated that the

reports indicted that the defendant did not meet the criteria for a plea of not guilty by reason of insanity. Nevertheless, the defendant's counsel indicated they would still proceed with the plea of not guilty by reason of insanity ("NGRI").

As noted in the Opinion and Judgment Entry of the Court of Appeals (Appendix A), the defendant (appellant below) several times before trial expressed his wish to pursue a defense based on a NGRI plea. The defendant first made statements on the record showing that he personally wished to pursue a defense based upon a plea of not guilty by reason of insanity, even if his counsel did not believe that was the best way to proceed, at a hearing on October 28, 1994. During this hearing, the defendant was asked by the court to explain his reasons. The defendant stated that he wished to be represented by defense of not guilty by reason of insanity due to cocaine addiction. Slip op. at 6-7. He explained that he believed he suffered brain damage due to cocaine use. The defendant stated that he wanted an expert to testify on the issue of cocaine addiction and brain damage to support his insanity defense. *Id.* at 7.

On November 1, the defendant again expressed his wishes to pursue a NGRI defense and obtain new counsel for

this purpose, in a pro se motion to the trial court. Id. at 8.

Finally, as indicated in the opinion from the court below:

> On November 2, 1994, appellant again made his wishes known when his appointed counsel withdrew the not guilty by reason of insanity plea and entered a "straight not guilty plea to the indictment and all the specifications." The trial judge approved the withdrawal of the not guilty by reason of insanity plea and began to address other matters. Appellant's appointed counsel interrupted and stated:
>
> "Excuse me, Your Honor. Before we go any further, Mr. Tenace has asked me to inform the Court that that's not his decision. However, we've made our decision as counsel and evaluating the strengths and weaknesses of that particular defense and decided to withdraw that defense."
>
> The trial judge stated: "Is that correct, Mr. Tenace?" Appellant replied: "Yes, Your Honor." And the trial judge said: "We shall show it withdrawn."

Id. at 8-9.

Testimony was taken on November 3 and 4, 1994. Among the witnesses called by the State of Ohio was Lois Hamilton, the next door neighbor of the deceased/victim, Edward Kozlowski. Ms. Hamilton identified the defendant as the individual who had been doing work on the Kozlowski residence.

Also called as a witness was Laurie Moore. Ms. Moore indicated that the defendant arrived and began to stay at her home on Christmas Eve, 1993. The defendant supported himself by doing construction work and finding employment by soliciting jobs that he had obtained from the City Directory at the library. Ms. Moore identified State's Exhibit 12 as a page of the City Directory that had been given to her by the defendant with a code on it to obtain cash from Western Union for the defendant. The page also contained the victim's name and address which was circled. According to Ms. Moore, the defendant was doing a chimney job on Wamba Street, and the defendant indicated that the victim (Kozlowski) had a pocketful of money.

On January 25, 1994, a Tuesday, Ms. Moore allowed Ben Covington to drive the defendant to the Wamba Street address. Several hours after they returned, she had a conversation with Covington raising suspicions that the defendant may have injured somebody that night. The defendant suddenly started calling New York every couple of minutes all that night and the next day. He was calling his ex-wife to send money, saying he had to get out of town. Ms. Moore testified that while watching a newscast that

reported the homicide, the defendant indicated "he didn't want to hear this shit" and "that he started walking around the house mumbling to himself that he [the victim] must have chocked on the gag."

Mr. Covington testified that he drove the defendant to 930 Wamba, the home of the victim, on January 25, 1994. After dropping off the defendant, Mr. Covington went to a store approximately a block and a half away from the residence. Five to seven minutes later, while Mr. Covington was getting in his car, the defendant found him at the store and got in the car. The witness had a conversation with the defendant a few days later, during which the defendant indicated that he had "killed a motherfucker like that . . . you know, . . . the old guy."

Another witness, Marlene Murphy, also resided at Ms. Moore's home. She recognized the scene of the homicide as it was being shown on the news, because she had once taken the defendant to the Wamba Street home and had returned to pick him up. Ms. Murphy testified that following the news broadcast, she and others in the residence read the newspaper account of the homicide. The defendant said "they have no evidence . . . they don't have

enough to pin on nobody. They don't know who did it. . . (and) he told Lamont not to worry; that he would take the rap for all of it because he didn't know what . . . Lamont didn't know anything that was going on. "

The last witness for the State was Detective Tom Ross. He testified to the role that he played in the investigation of the crime. Most importantly, Detective Ross had taken a statement from the defendant following his arrest. In that taped-recorded statement, which was played to the jury, the defendant admitted that he was the perpetrator of the homicide.

On November 4, the jury deliberated and decided that Respondent was guilty of both counts and of the specification. The mitigation phase of the trial was held November 9, 1994. The defendant's mother and sister testified extensively about the horrendous upbringing and social history of the defendant. The final witness in mitigation was Dr. Jeffrey Smalldon, a clinical psychologist. According to Dr. Smalldon, the defendant suffered from post-traumatic stress syndrome, dysthymia (a long-standing, low-grade depression) and an antisocial personality disorder. Dr. Smalldon also believed it likely that the defendant suffered

from undiagnosed attention deficit disorder ("ADD"), which is considered a brain disorder. The defendant is also cocaine and alcohol dependent. Dr. Smalldon testified that he did not find sufficient evidence to conclude that the defendant had any "significant brain lesion or localized area of brain malfunction."

The next day, November 10, 1994, the jury returned a recommendation of death. On November 30, 1994, the court sentenced the defendant to death for the aggravated murder and to incarceration for a period of ten (10) to twenty-five (25) years for the aggravated robbery.

On appeal to the Court of Appeals for Lucas County, Ohio, Sixth Appellate District, Respondent raised twenty assignments of error. The first of these was framed as follows:

> THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE WHEN IT DENIED HIS PRO SE MOTION ASKING THAT TRIAL COUNSEL WITHDRAW AND THAT HE BE GIVEN A CONTINUANCE IN ORDER TO OBTAIN NEW COUNSEL AND WHEN IT PERMITTED TRIAL COUNSEL, OVER APPELLANT'S REQUEST, TO WITHDRAW HIS PLEA OF NOT GUILTY BY REASON OF INSANITY AND REPLACE THAT PLEA WITH A STRAIGHT PLEA OF NOT GUILTY.

Essentially, Respondent argued that the trial court erred when it permitted defense counsel, over Respondent's objection, to withdrawn the plea of "not guilty by reason of insanity" and proceed to trial with a straight "not guilty" plea.

In reply, Petitioner argued that a plea of "not guilty by reason of insanity" is not a right personal to a criminal defendant, but is in the nature of an affirmative defense that can be altered in the exercise of defense counsel's sound professional judgment. Petitioner also argued that if the trial court erred by accepting the change of plea contrary to Respondent's wishes, such error was harmless under the circumstances of this case. Finally, Petitioner argued that the disagreement between Respondent and his defense counsel concerning presentation of the defense of "not guilty by reason of insanity" was a difference of opinion concerning trial strategy that did not result in such a breakdown of the attorney-client relationship that continued representation of Respondent by the same counsel represented ineffective assistance of counsel.

The court below first held that a NGRI plea is a matter personal to a defendant that cannot be withdrawn by counsel in opposition to the defendant's wish to maintain the plea.

Slip op. at 19. The Court of Appeals then pronounced that error by a trial court in permitting counsel to withdraw a NGRI plea over the defendant's objection could not be harmless error, because the error affected a "substantial right" of the defendant. *Id.* Finally, the appellate tribunal concluded that the withdrawal of the defendant's plea by counsel against his wishes reflected "a breakdown in the attorney-client relationship that was of such magnitude, [the defendant] was deprived of the right to effective assistance of counsel." *Id.* at 20. Finding the defendant's first assignment of error to be well-taken, the court of appeals determined that the remaining assignments were rendered moot, and reversed the judgment of conviction. It is from this Opinion and Judgment Entry of the Court of Appeals that Petitioner sought review by the Supreme Court of Ohio and now seeks further review by this Court.

As can be seen by the foregoing, all of the questions presented for review by this Court were previously raised and addressed by the court below.

REASONS FOR GRANTING THE WRIT

QUESTION NO. 1: Is a criminal defendant's plea of "not guilty by reason of insanity" a matter personal to the defendant which cannot be withdrawn by counsel for the accused over the objection of the defendant, or in the nature of an affirmative defense that can be withdrawn by a defendant's counsel and replaced by a straight plea of "not guilty" if the counsel, in the exercise of sound trial strategy, determines that such action represents the best interest of the defendant?

The facts of this case were reiterated above at some length, because these facts alone illustrate that this case is a case of public or great general interest. This was a death penalty case. The evidence against the defendant was overwhelming, and included confessions by the defendant to the police and to lay witnesses. Indeed, although the defendant raised twenty assignments of error on appeal, he never suggested that he was not guilty of the crime.

In addition, the facts relevant to the defendant's insistence on maintaining a NGRI plea clearly show that the accused erroneously believed that his cocaine addiction and/or the effects that such addiction had on his mental

capacity would serve as a defense to the charge of capital murder. In other words, the difference of opinion between the defendant and his counsel over the presentation of an insanity defense was the result of the defendant's misinformed view that diminished capacity, or something akin to diminished capacity, affords a criminal defense in the State of Ohio.

Finally, the facts of this case clearly show that the defendant's trial counsel knew that evidence of diminished capacity would not be admissible in defense of the charges, but was appropriate evidence in mitigation of the sentence, in order to avoid a penalty of death. Therefore, defense counsel introduced significant evidence of the defendant's cocaine addiction and concomitant psychological problems during mitigation.

Nevertheless, based on a finding that a NGRI plea is personal to a defendant and cannot be withdrawal by counsel over a defendant's objection, the Court of Appeals for Lucas County, Ohio, Sixth Appellate District, reversed the judgment of conviction against a murderer and ordered a new trial. As a result, the prosecutor now has no choice but to engage in the costly and time-consuming process of retrying the

defendant. The State will have to take this action despite the overwhelming evidence against the defendant presented in the first trial, and the fact that allowing the defendant to maintain a NGRI plea would not have altered the evidence submitted by either party in the guilt phase or resulted in a different verdict. This situation represents precisely the type of "technicality" and elevation of form over substance that the American people justifiably fail to understand or appreciate. Otherwise stated, this Court should accept jurisdiction and hear arguments in this case simply because the case involves the technical application of an alleged "right" of a defendant to hinder prosecution for the crime of capital murder in a manner that the public finds of great general interest (albeit distressing).

Moreover, Petitioner contends that no error at all occurred when trial counsel were permitted to withdraw the NGRI plea over the defendant's objection. On appeal, Respondent and the Court of Appeals relied primarily on *State v. Turner*, slip op., Court of Appeals for Medina County, Ohio (Sept. 17, 1980), unreported (reproduced as Appendix F at pages App. 40 through App. 49). In *Turner*, the Ninth Appellate District of the State of Ohio ruled that a plea of not

guilty by reason of insanity cannot be withdrawn in the course of the trial by defendant's counsel acting against the defendant's wishes. *Turner*, with its perfunctory and conclusory holding, was called into question by the well-reasoned opinion of the Eighth Appellate District of the State of Ohio in *State v. Smith* (1981), 3 Ohio App.3d 115:

> There is some uncertainty whether that action is a matter of strategy within the exclusive control of defense counsel or is a fundamental right within the exclusive control of the defendant himself. See A.B.A. Standards Relating to the Administration of Criminal Justice, The Defense Function, Section 5.2 (Approved Draft 1971):
>
> " **Control and direction of the case**.
>
> "(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.
>
> "(b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.
>
> "(c) If a disagreement on significant matters of tactic or strategy arises between the lawyer and his client, the lawyer should

make a record of the circumstances, his advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relation."

The accompanying notes to the A.B.A. Standards make clear that the defendant's control over "what plea to enter" concerns the pleas of "guilty" and "not guilty."

There may be important strategic reasons why counsel chooses to withdraw an insanity defense like any other defense, when an unsophisticated client fails to understand the wisdom of that decision. For example, an insanity defense implies to many jurors an admission that defendant committed the act charged, and in some cases it may also lead to admission of psychiatric testimony that recites defendant's admissions during his mental examination or is otherwise harmful to the defense. Although no other Ohio decision has been found which directly addresses this issue, the Franklin County Court of Appeals ruled that a trial court is required to appoint counsel for a mentally disturbed defendant and to heed that counsel's request for a psychiatric examination of the defendant, despite defendant's personal objection to those actions. *State v. Jackson* (1973), 36 Ohio App. 2d 164 [65 O.O.2d 253].

...

This case must be distinguished from cases in which a defendant seeks to withdraw a not guilty plea and to enter a guilty plea. In that situation the trial court must personally address the defendant to ensure that the guilty plea is being voluntarily and knowingly entered. Crim R. 11(C)(2); *State v. Buchanan* (1974), 43 Ohio App. 2d 93 [72 O.O.2d 307].

> Here, however, defense counsel merely sought withdrawal of the plea of not guilty by reason of insanity and wished to proceed on the not guilty plea. By so doing, defense counsel did not seek to waive any of defendant's constitutional rights, since a not guilty plea puts all essential elements of the offense charged in issue and requires the state to prove each of them beyond a reasonable doubt. *State v. Manago* (1974), 38 Ohio St. 2d 223, 313 N.E.2d 10 [67 O.O.2d 291]; *State v. Nutter* (1970), 22 Ohio St. 2d 116, 258 N.E.2d 440 [51 O.O.2d 178].
>
> There is no requirement that a defendant personally withdraw a plea of not guilty by reason of insanity. Although not directed to the withdrawal of such a plea, Crim. R. 11(A) permits a written plea of not guilty by reason of insanity to be signed either by a defendant or his counsel. *People v. Gaines* (1962), 25 Cal. Rptr. 448, 375 P.2d 296, contains a persuasive argument that a statute which requires that a defendant enter a plea personally, and is silent as to withdrawal of that plea, authorizes withdrawal by counsel of a plea of not guilty by reason of insanity, in the absence of dissent by the defendant. This argument is stronger under Crim. R. 11(A) which permits the plea of not guilty by reason of insanity to be made either by a defendant or his counsel.

Smith, 3 Ohio App.3d at 118-120 (emphasis in original).

As this opinion shows, at least four independent reasons support the conclusion that the decision whether or not to withdraw a NGRI plea is not a matter personal to an accused which cannot be exercised without his or her

consent or contrary to the defendant's wishes. First, the ABA Standards suggest that retention of an accused's right to plea as he desires is limited to pleas of "guilty" and "not guilty." Second, just as a defendant's counsel may enter a plea on behalf of the client, so should counsel be able to withdraw a plea. Third, the withdrawal of a NGRI plea, unlike the entry of a plea of guilty, does not relinquish any of a defendant's constitutional rights. Finally, there may be sound tactical reasons for the withdrawal of a NGRI plea, and trial strategy has generally been held to be within the purview of a defendant's counsel, not the accused personally. For all of these reasons, Petitioner urges this Court to grant the instant petition, review this case, and hold that a defendant's trial counsel may (generally or in limited situations) withdraw a NGRI plea over the objection of the accused.

This Court should review this key issue concerning the nature of a NGRI plea and/or its withdrawal. It is obviously a matter affecting the fundamental relationship between trial counsel and criminal defendants. According to the decision below, "the right of a defendant who is competent to stand trial, but who insists he was insane at the time of the crime, to choose what plea to enter is a

substantial right." Slip op. at 19. Accordingly, resolution of the key issue in this appeal would necessarily clarify whether a NGRI plea represents a "right" personal to criminal defendants or a defense governed by the expertise of counsel in the exercise of sound trial strategy. Resolution of the issue would also present this Court with the opportunity to clarify generally the distinction between those decisions that are best left to trial counsel and those that the defendant has the sole ability to control.

This Court should also review this main issue because it presents an issue of first impression for this Court. Because this Court has not spoken on the matter, the court below was forced to draw inferences from cases from Ohio appellate cases and from foreign jurisdictions, including cases from the Seventh and Eleventh Circuit federal courts, the Supreme Court of California, and an Arizona appellate court. Moreover, as noted above, the Ohio cases suggest different answers to the question. In addition, as a review of the opinion of the court below shows, the federal courts that have considered the issue have also suggested contradictory answers. Compare *Weber v. Israel*, 730 F.2d 499, 507-508 (7th Cir. 1984) (opining that an NGRI plea is in the nature of

an affirmative defense and a strategic decision of trial counsel) with *Alford v. Wainwright*, 725 F.2d 1282, 1289 (not ineffective assistance of counsel to abide by client's wish to forego insanity defense), cert. denied, 469 U.S. 956 (1984). Given the general, unsettled nature of the law on this issue, this Court should resolve the matter.

QUESTION NO. 2: Assuming that it is error for a trial court to accept the withdrawal of a criminal defendant's plea of "not guilty by reason of insanity" if offered by defense counsel, but with an affirmative objection on the record by the defendant, can such error be harmless error if there is insufficient evidence of record to support a defense of "not guilty by reason of insanity" and sufficient evidence exists to support the guilty verdict against the accused?

This case would also present the Court with the opportunity to clarify the nature of "harmless error." The Court of Appeals for Lucas County, Ohio, after finding that error had occurred, ruled, in effect, that such error could never be harmless, because the error affected a "substantial right" of the defendant. The court below merely characterized the "right" of a defendant to maintain a NGRI plea as a

"substantial right," without sufficient explanation of why such a right is "substantial." The reviewing court opined that prejudice necessarily occurs "when a court allows trial counsel to withdraw a plea of not guilty by reason of insanity over a client's objection because the client is deprived 'of the opportunity of presenting testimony relating to his chosen defense.'" Slip op. at 19 (quoting *Turner*, *supra*).

Petitioner believes that the court below erred in failing to weigh the error, if any, committed at trial against the substantial evidence in support of the verdict. The lower court's findings, first that the existence of a NGRI plea is a "right," and then that the "right" is so "substantial" that harmless error could never be found, were both question-begging and without merit as a matter of law.

The instant case provides an excellent example of why the Court of Appeals erred when it rendered this holding. As noted above, the defendant wished to pursue a NGRI defense due to his erroneous belief that diminished capacity acts a defense in the State of Ohio. His counsel simply knew better. Counsel knew that evidence of cocaine addiction and mental incapacity was appropriate evidence to adduce during the mitigation phase of trial, but that such evidence would be

inadmissible during the guilt phase of trial. Moreover, counsel was not possessed of any evidence that would establish that the defendant was, in fact, legally insane at the time of the commission of the offense. In the absence of any evidence, especially expert testimony, that would have established the defendant's insanity, trial counsel was under no obligation under Ohio law to pursue a NGRI defense. See *State v. Purcell* (1995), 107 Ohio App.3d 501, 506; *State v. Wong* (1994), 95 Ohio App.3d 39, 47-49.

Moreover, without evidence, and in accordance with Ohio law, the insanity defense would not have been submitted to the jury. See *State v. Reynolds* (1988), 49 Ohio App.3d 27, 31. Therefore, contrary to the opinion of the Court of Appeals, retention of a NGRI plea in the instant case would have changed nothing concerning the evidence adduced at trial. It is clear that the error, if any, in the instant case did not alter the jury's verdict. Thus, withdrawal of the plea did not deprive the defendant of the defense of his choosing. The lack of evidence of insanity deprived the defendant of the defense of his choosing. This demonstrates that error, if any, was harmless beyond a reasonable doubt.

Moreover, if the defendant's counsel had failed to withdraw the NGRI plea and then offered no evidence supporting the insanity defense, such a presentation would have acted to the detriment of the accused. A NGRI plea suggests that a defendant is admitting having committed the crime. In addition, the prosecution could have commented on and ridiculed this unsubstantiated defense to the defendant's prejudice. Thus, not only was the defendant not prejudiced by withdrawal of the NGRI plea, he actually benefited thereby.

QUESTION NO. 3: Does a disagreement between a defendant and the defendant's trial counsel concerning trial strategy, including whether or not to maintain a defense based on insanity, necessarily result in a breakdown of the attorney-client relationship of such a magnitude that continued representation of the defendant by the same counsel constitutes ineffective assistance of counsel?

The court below concluded that "in this case a breakdown occurred in the attorney-client relationship that was of such magnitude, appellant was deprived of the right to effective counsel." Slip op. at 20. In the instant case, however, the difference of opinion between the defendant

and his counsel over presentation of an insanity defense was the result of the accused's misinformed view that diminished capacity, or something akin to diminished capacity, is a defense in Ohio. Counsel, on the other hand, simply knew better. Given the defendant's erroneous view of the law, it is virtually certain that any counsel would have become at odds with the accused. Under these circumstances, Petitioner contends that it cannot be said that the perceived "breakdown" in the attorney-client relationship was of the type that resulted in the rendering of ineffective assistance of counsel.

Petitioner believes that the appellate court made a quantum leap when concluding that the difference of opinion between defense counsel and the defendant concerning presentation of a NGRI defense resulted in such a breakdown in the attorney-client relationship that the defendant was deprived of the effective assistance of counsel. In taking review of this case, this Court could elucidate when, if ever, a mere difference of opinion between an appointed counsel and a defendant concerning the type of defense to present, without more, results in a breakdown of the attorney-client

relationship of such magnitude that the defendant is necessarily deprived of the effective assistance of counsel.

CONCLUSION

For the reasons addressed above, the petition for writ of certiorari should be granted. In addition, this case should be taken for review to avoid the negative complications that could result from a continuing application of the holdings below. By analogy, the decision below could be used to support claims for post-conviction review in virtually every case in which a NGRI plea is initially entered and later withdrawn. If the defendant protested the withdrawal in any way, the defendant could argue that the violation of his "substantial right" resulted in reversible error, by definition. Even if a defendant did not enter a NGRI plea or failed to object to the withdrawal of such a plea, nothing would prevent the defendant from asserting in a petition for post-conviction relief that he or she had informed trial counsel of the accused's wish to exercise the "right" of entering and/or maintaining a NGRI plea. Indeed, taken at face value, the decision below even supports the view that a breakdown of the attorney-client relationship, resulting in ineffective assistance of counsel, can occur whenever a criminal

defendant, however unreasonably, differs with trial counsel concerning the defenses to pursue. In short, the ruling below seriously undermines the traditional nature of the attorney-client relationship, placing matters in the hands of criminal defendants that are more properly within the purview of the attorney's expertise. Moreover, by confusing the role of counsel and criminal defendant, the decision below invites reversible error, occurring between counsel and the accused, over which the government has no control, to the detriment of the interest of the people of this country in effective prosecution of criminals.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF LUCAS COUNTY

State of Ohio — Court of Appeals No. L-95-010

Appellee — Trial Court No. 94-5235

v.

Troy Matthew Tenace — OPINION AND JUDGMENT ENTRY

Appellant — Decided: July 25, 1997

*****

Julia R. Bates, prosecuting attorney, and Craig T. Pearson, for appellee.

Jeffrey M. Gamso and Larry V. DiLabbio, for appellant.

*****

HANDWORK, J. This is an appeal from a November 30, 1994 judgment entry of the Lucas County Court of Common Pleas in which the court sentenced appellant, Troy Matthew Tenace, to death. The court accepted a jury verdict that found appellant guilty of aggravated robbery and of aggravated murder with death penalty specifications. The specifications were that he purposely caused the death of

another while committing robbery, and that he was the principal offender.

Appellant has presented the following assignments of error for consideration on appeal:

"FIRST ASSIGNMENT OF ERROR
THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE WHEN IT DENIED HIS PRO SE MOTION ASKING THAT TRIAL COUNSEL WITHDRAW AND THAT HE BE GIVEN A CONTINUANCE IN ORDER TO OBTAIN NEW COUNSEL AND WHEN IT PERMITTED TRIAL COUNSEL, OVER APPELLANT'S REQUEST, TO WITHDRAW HIS PLEA OF NOT GUILTY BY REASON OF INSANITY AND REPLACE THAT PLEA WITH A STRAIGHT PLEA OF NOT GUILTY.

" SECOND ASSIGNMENT OF ERROR
APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL, AGAINST HIS EXPLICIT WISHES, WITHDREW HIS PLEA OF NOT GUILTY BY REASON OF INSANITY AND REPLACED IT WITH A STRAIGHT PLEA OF NOT GUILTY.

" THIRD ASSIGNMENT OF ERROR
THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE BY SETTING AN ARBITRARY CEILING OF $ 7,500 FOR EXPERT ASSISTANCE.

" FOURTH ASSIGNMENT OF ERROR
THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE WHEN IT OVERRULED HIS MOTION TO SUP PRESS.

" FIFTH ASSIGNMENT OF ERROR
THE TRIAL COURT WRONGLY GRANTED THE STATE'S CHALLENGE FOR CAUSE OF PROSPECTIVE JUROR TIMOTHY MOSS.

" SIXTH ASSIGNMENT OF ERROR
THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING INTO EVIDENCE STATE'S EXHIBIT 7, A PHOTOGRAPH OF THE DECEASED WHICH DOES NOT REVEAL HOW HE LOOKED AT THE TIME OF THE
OFFENSE BUT, RATHER, INDICATE [SIC] HOW HE LOOKED TWO DAYS LATER WHEN HIS
BY-THEN-PARTLY-DECOMPOSED BODY WAS FOUND.

" SEVENTH ASSIGNMENT OF ERROR
APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE FAILURE OF THE TRIAL COURT TO INQUIRE WHETHER HE KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO TESTIFY AT TRIAL.

" EIGHTH ASSIGNMENT OF ERROR
THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING INDIVIDUALLY TO VOIR DIRE THE JURORS ABOUT APPELLANT'S OUTBURST AND IN NOT INSTRUCTING THE JURORS TO DISREGARD THE OUT BURST. (TR 1317-1328.)

" NINTH ASSIGNMENT OF ERROR
IF ANY ERROR REGARDING THE COURT'S FAILURE TO VOIR DIRE OR INSTRUCT THE JURY ABOUT APPEL LANT'S OUTBURST WAS WAIVED BY TRIAL COUNSEL'S FAILURE OT REQUEST SUCH A REMEDY, THEN APPEL LANT RECEIVED

INEFFECTIVE ASSISTANCE OF COUNSEL.

" TENTH ASSIGNMENT OF ERROR
THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT INSTRUCTED THE JURY THAT IT HAD TO REACH A UNANIMOUS DECISION THAT THE AGGRAVATING CIRCUMSTANCE DID NOT OUTWEIGH THE MITIGATING FACTORS BEFORE IT COULD CONSIDER A LIFE SENTENCE.

" ELEVENTH ASSIGNMENT OF ERROR
INSOFAR AS APPELLANT'S TRIAL COUNSEL MAY HAVE WAIVED THIS ISSUE, APPELLANT RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL.

" TWELFTH ASSIGNMENT OF ERROR
THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF OHIO WHEN IT DENIED HIS MOTION TO DISMISS THE DEATH SPECIFICATION.

" THIRTEENTH ASSIGNMENT OF ERROR
A DEATH PENALTY LAW WHICH HAS NOT BEEN
ENFORCED IN OVER THIRTY YEARS IS, BY DEFINITION CRUEL AND UNUSUAL.

" FOURTEENTH ASSIGNMENT OF ERROR
THE DEATH PENALTY IN THIS CASE CAN ONLY BE VIEWED AS FREAKISH, CAPRICIOUS, AND ARBITRARY.

" FIFTEENTH ASSIGNMENT OF ERROR
THE SENTENCE IMPOSED BY THE TRIAL COURT IS ILLEGAL AS VIOLATIVE OF R.C.

2949.22.

" SIXTEENTH ASSIGNMENT OF ERROR
THE TRIAL COURT ERRED IN IMPOSING A DEATH SENTENCE IN THIS CASE BECAUSE THE DEATH PEN ALTY LAW AS APPLIED IN OHIO VIOLATES R.C. 2929.05(A) BY REQUIRING APPELLATE COURTS AND THE SUPREME COURT, IN CONDUCTING THEIR R.C. 2929.04(A) REVIEW OF 'SIMILAR CASES' FOR PROPORTIONALITY, TO REVIEW ONLY THOSE IN WHICH A SENTENCE OF DEATH WAS IMPOSED AND IGNORE THOSE IN WHICH A SENTENCE OF LIFE WITHOUT PAROLE ELIGIBILITY AFTER TWENTY FULL YEARS OR LIFE WITH PAROLE ELIGIBILITY AFTER THIRTY FULL YEARS WAS IMPOSED. THE CURRENT METHOD ALSO VIOLATES THE RIGHTS TO FAIR TRIAL AND DUE PROCESS AND RESULTS IN THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT AS SET FORTH IN THE FIFTH, SIXTH, EIGHTH, NINTH AND FOUR TEENTH AMENDMENTS TO THE UNITED STATES CON STITUTION AND IN SECTION 1,2,5,9,10,16, AND 20, ARTICLE I OF THE OHIO CONSTITUTION.

" SEVENTEENTH ASSIGNMENT OF ERROR
INSOFAR AS THE ISSUE ADDRESSED IN THE SIXTEENTH ASSIGNMENT OF ERROR MAY HAVE BEEN WAIVED BY NOT HAVING BEEN RAISED BELOW, APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

" EIGHTEENTH ASSIGNMENT OF ERROR
A DEFENDANT WHO IS SENTENCED TO DEATH FOLLOWING A TRIAL AND MITIGATION HEARING IN WHICH HIS

COUNSEL WAS DEFICIENT HAS BEEN DENIED HIS RIGHTS TO FAIR TRIAL AND DUE PROCESS AND IS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT, ALL AS SET FORTH IN THE FIFTH, SIXTH, EIGHTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IN SECTIONS 1,2,5,9, 10,16, AND 20, ARTICLE I OF THE OHIO CONSTITUTION.

" NINETEENTH ASSIGNMENT OF ERROR THE JURY AND THEN THE TRIAL COURT ERRED IN CONCLUDING, AND THIS COURT SHOULD NOT CON CLUDE, THAT THE AGGRAVATING CIRCUMSTANCE, THAT THE AGGRAVATED MURDER IN THIS CASE WAS COMMITTED IN THE COURSE OF AN AGGRAVATED ROBBERY AND THAT APPELLANT WAS THE PRINCIPAL OFFENDER IN THE AGGRAVATED MURDER, OUTWEIGHED THE MITIGATING FACTORS BEYOND A REASONABLE DOUBT.

" TWENTIETH ASSIGNMENT OF ERROR THE SENTENCE OF DEATH WAS WRONGLY IMPOSED BECAUSE IT IS INAPPROPRIATE AND NOT PROPOR TIONAL TO THE SENTENCE IMPOSED IN SIMILAR CASES.

We begin by considering appellant's first assignment of error.

In support of his first assignment of error, appellant argues that the trial court erred when it denied his request that his appointed trial counsel be withdrawn and that his trial be continued for ninety days to enable his family to hire

private counsel. Appellant contends that a clear and absolute breakdown of the attorney-client relationship occurred when, against his wishes, his court appointed attorneys withdrew his plea of not guilty by reason of insanity and proceeded to trial on a plea of not guilty.

The Supreme Court of Ohio has ruled:

> "To discharge a court-appointed attorney, the defendant must show a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel." State v. Coleman (1988), 37 Ohio St. 3d 286, 525 N.E.2d 792, paragraph four of the syllabus.

The question in this case, therefore, is whether there is evidence that such a breakdown occurred.

Appellant asserts that the record clearly shows that he wished to go to trial with a plea of not guilty by reason of insanity and that his appointed counsel withdrew the plea against his wishes and over his protest. Appellee responds that the statements made by appellant on the record leave some question that appellant objected to the withdrawal of the plea of not guilty by reason of insanity. Appellee further responds that absent a clear objection on the record from appellant, his counsel were free to make a tactical decision to

withdraw the not guilty by reason of insanity plea and to proceed to trial on a straight plea of not guilty. This court has carefully examined the record which shows the following events occurred with regard to the plea of not guilty by reason of insanity.

On March 10, 1994, a written plea of not guilty by reason of insanity was filed for appellant in the Lucas County Court of Common Pleas. The trial court referred appellant to the Court Diagnostic & Treatment Center for a report on his competency to stand trial, pursuant to R.C. 2945.37 and for an evaluation pursuant to R.C. 2945.40.

On April 25, 1994, the trial court stated that it had received reports from the diagnostic and treatment center. The reports showed that appellant was competent to stand trial. The trial judge also stated that the reports indicated that appellant did not meet the criteria for a plea of not guilty by reason of insanity.[1] Appellant's counsel indicated they would still proceed with the plea of not guilty by reason of insanity.

On October 11, 1994, appellant was referred for a second competency evaluation following his attempt to commit suicide in jail. His appointed attorneys informed the

court that they did not believe appellant could assist in his own defense due to his mental state.

On October 28, 1994, the trial court reported on the record that it had received the results of the second competency evaluation, and that appellant was competent to stand trial.[2] At the hearing on October 28, 1994, appellant first made statements on the record showing that he personally wished to pursue a defense based upon a plea of not guilty by reason of insanity, even if his counsel did not believe that was the best way to proceed.

Appellant made his statements in support of a pro se motion asking the trial court to permit his appointed counsel to withdraw and to grant him a ninety day continuance of his trial date so that he could obtain private counsel. When the trial judge asked appellant, on the record, his reasons for the motion, he told the trial judge:

> "Due to the nature of the possible death sentence, I wish to be represented by defense of not guilty by reason of insanity due to cocaine addiction. I am enclosing numerous letters I've written to my lawyer, ***, notifying him of my intent. There are certain legal and medical documents that will corroborate my defense.

> "Under my Constitutional rights to due pro cess and effective assistance of counsel, I do not feel I can go forth with my scheduled trial if I am not adequately represented. By 'adequately' I mean as I was [sic] described above. *** "

He made further statements indicating that he wanted an insanity defense and that he wanted new counsel because he and his current counsel "have a difference in our defense *** ." He explained that he believed he suffered brain damage due to cocaine use. He stated that he wanted an expert to testify on the issue of cocaine addiction and brain damage to support his insanity defense.

The trial judge asked appellant's appointed counsel if they had discussed possible defenses with appellant. When they said yes, the trial judge told appellant: "My strong suggestion is that you let them run the case, because they know what they're doing, instead of you run the case." The trial judge then denied the motion filed by appellant, and appellant asked that his objection be noted for the record.

On November 1, 1994, appellant continued to make his wishes known regarding the plea of not guilty by reason of insanity. He again filed a pro se motion asking the trial court

to permit his appointed counsel to withdraw and asking the trial court to grant a continuance of his trial date to permit him to hire private counsel. This time the pro se motion was written and was filed into the record. The motion states, in pertinent part:

> "Defendant makes this contention, because counsels [sic] have failed to consult in a meaningful manner with defendant about his theory of defense for the upcoming trial in the court.
>
> "Defendant wants to present an insanity defense to refute the intent element to the State's charge of aggravated murder."
>
> "Defendant's appointed counsels [sic] have failed to substantially investigate the insanity theory of defense. Going so far as to informing defendant's mother that Ohio has no provision for this defense under Ohio law! Defendant contends, that counsels [sic] have failed to take into account, that it is counsel's job to effectively assist him. So long as defendant's theory of defense is grounded in sound and correct jurisprudence, he's entitled to having this defense presented to a jury. The jurors being the ultimate 'trier of facts'."

The court addressed appellant on the record regarding the motion and denied the request.

On November 2, 1994, appellant again made his wishes known when his appointed counsel withdrew the not

guilty by reason of insanity plea and entered a "straight not guilty plea to the indictment and all the specifications." The trial judge approved the withdrawal of the not guilty by reason of insanity plea and began to address other matters. Appellant's appointed counsel interrupted and stated:

> "Excuse me, Your Honor. Before we go any further, Mr. Tenace has asked me to inform the Court that that's not his decision. However, we've made our decision as counsel and evaluating the strengths and weaknesses of that particular defense and decided to withdraw that defense."

The trial judge stated: "Is that correct, Mr. Tenace?" Appellant Appellant replied: "Yes, Your Honor." And the trial judge said: "We shall show it withdrawn."

Even after the trial began, appellant continued to raise the issue that he still wished to maintain a defense based upon a plea of not guilty by reason of insanity. Appellant asked the trial judge for permission to conduct cross-examination on a particular witness called by the prosecution. When the trial court denied his request, appellant stated:

> "Okay. I'd like to say this: Obviously, the defense that I wanted to present, my lawyers do see that it is of some value because they

> are planning to use that in mitigation. So, obviously, they see that it has some legal value. And again I want it noted that I object to this; that I wanted that defense from the beginning, the one that they're using from mitigation, I wanted this used during my trial. And I just want it noted that I object to this, again, and I'd like it on record."

Appellant again made a statement for the record showing that the plea of not guilty by reason of insanity was withdrawn against his wishes after he had an outburst in court during the cross-examination of his sister during the mitigation phase of the trial. Appellant stated, in part:

> "From the very beginning, I don't feel I'm being represented properly and I'm upset. I'm upset. From the very beginning, I notified these people that -- what defense I want. And it says in the law books that I have a right to do that, but yet I've been denied that right. That's why I'm upset."

This court finds, after reviewing the overall record associated with the entry and withdrawal of appellant's plea of not guilty by reason of insanity, that it is clear that the plea was withdrawn against appellant's wishes. We therefore consider the question of whether it was error for the trial court to permit appellant's counsel to withdraw the not guilty by reason of insanity plea against appellant's wishes.

Two appellate case are instructive regarding the issue we now consider. In the first case, the Ninth District Court of Appeals considered the specific question: "May counsel *** waive or withdraw defendant's plea of not guilty by reason of insanity over the objection of defendant himself?" State v. Turner (Sept. 17, 1980), Medina App. No. 963, unreported. The State v. Turner court ruled that such a waiver or withdrawal may not occur without the client's consent.

The facts in State v. Turner are quite similar to the facts in the case at bar. In State v. Turner the defendant's appointed trial counsel told the trial court he had secured clinical and medical reports regarding the defendant's psychiatric and psychological tests. He stated that on the basis of those reports, he would proceed to trial on a straight not guilty plea. The defendant objected, on the record, to the withdrawal of his plea of not guilty by reason of insanity. The Ninth District Court of Appeals said:

> "The entering of any plea to the charges contained in an indictment is a fundamental act reserved to the province of defendant himself. It is always hoped that, after a full and complete discussion of the issues involved - both factual and legal, the defendant considers the historic role of the attorney as

> counselor and enters that plea not only most protective of his rights but reflective of the posture of the case against him. But in those instances where counsel's advice is rejected, the accused preserves always his right to risk the eventual verdict of court or jury and any punishment inflicted upon him as a result. It is his right to determine the primary question posed to him at arraignment: 'Shall I plead guilty, not guilty (and if the latter plea might raise also the question of my own mental culpability at the time of the commission of the crime with which I am charged) not guilty by reason of insanity? The professional duty of counsel in this sphere is to present defendant those choices available, to explain their meanings, and then, to abide by his client's choices. Defense counsel cannot decide himself the path to be chosen; he cannot waive one or more of the defenses once chosen by his client, or withdraw one or more of the pleas entered, without the consent of the person he represents." Id.

Appellee contends that a second case from the Eighth District Court of Appeals is more instructive. In the case cited by appellee, State v. Smith (1981) 3 Ohio App. 3d 115, 444 N.E.2d 85, the Eighth District Court of Appeals of Ohio considered whether a trial court committed error when the trial court allowed a defendant's trial counsel to withdraw a plea of not guilty by reason of insanity without personally addressing the defendant to learn if that was the defendant's desire. State v. Smith (1981) 3 Ohio App. 3d 115, 444 N.E.2d

85. The Eighth District Court noted that there was "some uncertainty" regarding whether the decision to withdraw the not guilty by reason of insanity plea was a strategy decision or a decision within the exclusive control of the defendant.

The State v. Smith court cited to the ABA Standards Relating to the Administration of Criminal Justice, which provide that the decision of what plea to enter is to be made by the accused. The court stated that those guidelines are meant to apply only to a guilty or a not guilty plea. Id. at 118. The court acknowledged the ruling of the Ninth District Court of Appeals in State v. Turner (Sept. 17, 1980), Medina App. No. 963, unreported, and stated that even if that decision was presumed to be correct, it did not govern the case under consideration because one factor was different; in State v. Turner the defendant objected on the record to the withdrawal of the plea.

The Ninth District Court of Appeals then stated:

> "We hold that in the absence of any constitutional provision, statute, or court rule restricting defense counsel's authority to withdraw a plea of not guilty by reason of insanity, the trial court acts properly in accepting that withdrawal without personally discussing the matter with the defendant

> himself, at least when the record discloses no dissension from that decision by the defendant. " State v. Smith, 3 Ohio App. 3d at 120. (Emphasis added).

As we have previously noted, in the case at bar, appellant did object on the record to the withdrawal of the not guilty by reason of insanity plea. For that reason, State v. Smith is distinguishable from the case at bar, and State v. Turner remains viable and persuasive.

Further research shows that in addition to the existing Ohio case law, an ethical consideration supports a ruling that error occurs when trial counsel is permitted to withdraw a plea over a client's recorded objection. Ethical considerations were adopted by the Supreme Court of Ohio as guidelines for the conduct of attorneys. EC 7-7 states:

> "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge

> appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken. " (Emphasis added)

The language used in EC 7-7 clearly states that a lawyer must advise a client whether a particular plea is desirable, but it is the client who makes the decision about what plea should be entered. The language is not restricted to informing a client about a guilty or a not guilty plea; it contemplates a discussion on any plea and on whether the lawyer deems the plea desirable.

Appellee contends that the decision to withdraw a plea of not guilty by reason of insanity and instead to enter a straight plea of not guilty constitutes a tactical decision that is in the providence of the trial attorney. However, research conducted by this court shows that an attorney is free to make a tactical decision regarding what plea to enter only when a client does not choose to make the decision or does not object on the record.

In 1983, the United States Court of Appeals for the Seventh Circuit considered a habeas proceeding in which the defendant was complaining that his trial counsel withdrew a

not guilty by reason of insanity plea. Weber v. Israel (7th Cir. 1984), 730 F.2d 499, certiorari denied 469 U.S. 850, 83 L. Ed. 2d 103, 105 S. Ct. 167. The Weber court cited the discussion found in State v. Smith (1981) 3 Ohio App. 3d 115, 444 N.E.2d 85, and ruled that in its case, the decision of trial counsel to withdraw a not guilty by reason of insanity was a tactical decision. Once again, however, the facts are distinguishable from the case at bar, because in Weber, the court noted that Weber "gave absolutely no indication that he disagreed with the withdrawal of the insanity plea or objected to the withdrawal in any manner." 730 F.2d 508.

Further research shows that other state and federal courts have ruled that when a client is found competent to stand trial, the client is also competent to decide what plea to enter, even if the client's choice does not follow the legal advice from trial counsel. For instance, an Arizona appellate court considered a case in which the defendant was found competent to represent himself. The trial court appointed advisory counsel to assist the defendant in presenting his case. State v. Fayle (Ariz.App.Div. 1 1982), 134 Ariz. 565, 658 P.2d 218.

The advisory counsel repeatediy asked the trial court to permit him to present a complete insanity defense, even though the defendant had withdrawn the plea of not guilty by reason of insanity. The trial court permitted the advisory counsel to present a limited insanity defense within limits that the defendant agreed to accept. Id. at 223, 224. The defendant was convicted of assault with intent to commit murder and was sentenced.

The defendant then appealed, arguing that his trial counsel should have been permitted to pursue a full insanity defense, even though he would not consent to an insanity plea at trial. Id. at 221. The appellate court ruled that the wishes of the defendant regarding the insanity plea had to be followed when the defendant acted voluntarily and intelligently, even when the choices made were detrimental to the defendant. They quoted the following:

> "'Because the defendant must bear the ultimate consequences of any decision, we conclude that if a defendant has acted intelligently and voluntarily, a trial court must defer to his or her decision to waive the insanity defense.'" Id. at 229, quoting Frendak v. United States (D.C. 1979), 408 A.2d 364, 378.

The State v. Fayle court went on to discuss some strategic reasons why a defendant might reject an insanity defense (does not want treatment; prefers prison to an insane asylum; believes killing was justified) and concluded that no error occurred when the wishes of the defendant regarding his insanity plea were honored by the trial court. State v. Fayle, 658 P.2d at 229-230.

The Supreme Court of California also considered a case where a defendant made some choices, regarding a not guilty by reason of insanity plea, that his trial counsel advised were not the best tactical choice. People v. Medina (Cal. 1990), 51 Cal. 3d 870, 799 P.2d 1282, 274 Cal. Rptr. 849. The defendant in People v. Medina initially entered a not guilty by reason of insanity plea along with a not guilty plea. He subsequently withdrew the not guilty by reason of insanity plea. During the course of trial, he insisted on reinstating the plea of not guilty by reason of insanity, against his counsel's advice. He was convicted of murder and sentenced to death. Id. at 1300-1301.

The defendant in People v. Medina appealed, saying the trial court should not have permitted him to reinstate his

not guilty by reason of insanity plea. The Supreme Court of California, sitting in bank, ruled that the decision of whether to plead not guilty by reason of insanity is personal to the defendant and the "trial court had no discretion to deny defendant's motion to reinstate his insanity plea solely because his counsel opposed that choice on tactical grounds." Id. at 1301.

Similarly, at least one federal circuit court has ruled that an attorney who abides by a client's decision not to enter an insanity plea has not rendered ineffective assistance of counsel. Alvord v. Wainwright (C.A.11, 1984), 725 F.2d 1282, certiorari denied 469 U.S. 956. The facts in Alvord v. Wainwright show that the defendant had previously been found not guilty by reason of insanity in Michigan. He was arrested in Florida for committing three murders and was found competent to stand trial. He told his trial counsel he did not want an insanity defense. Instead, he insisted on asserting a weak alibi defense. Id. at 1286-1288.

Trial counsel complied with the defendant's instructions, and the defendant was found guilty and was sentenced to death. The defendant appealed, arguing he

received ineffective assistance of counsel. Id.

The United States Court of Appeals for the Eleventh Circuit said: " *** given Alvord's competency, [his trial counsel] was ethically bound to follow his client's wishes." Id. at 1288. The court stated that if a client was so impaired he could not choose for himself what to do, the trial court should find the client was not competent to stand trial. Id. at 1289. The court found that the defendant received effective assistance of counsel. Id.

A petition for certiorari was filed from the decision of the United States Court of Appeals for the Eleventh Circuit. The United States Supreme Court denied the petition for certiorari. Two justices, Justice Marshall and Justice Brennan, dissented from the decision denying the petition for certiorari. Alvord v. Wainwright (1984), 469 U.S. 956, 83 L. Ed. 2d 291, 105 S. Ct. 355.

In the dissent authored by Justice Marshall and joined by Justice Brennan, it was argued that the case should have been reviewed because the defendant's trial attorney did nothing to investigate the possible insanity defense available to his client or to persuade his client insanity was the best

defense. Justice Marshall stated:

> "The question is whether counsel had a duty to investigate his client's case and make a minimal effort to persuade him to follow the only plausible defense. The question is not whether counsel has a duty to override his client's wishes, or pursue fruitless investigations, thereafter." Id. at 293 (Marshall, J. dissenting)

In referring to the decision from the lower court Justice Marshall stated:

> "The decision establishes that absolute deference to the uninformed reaction of a defendant is acceptable, and that counsel's decision not to pursue the issue and make an attempt to persuade his client is reasonable." Id.

Justice Marshall pointed out that a lawyer must be sure his client:

> "has access to information relevant to the pretrial and trial decisions that the accused must make himself, such as whether to testify on his own behalf, to waive a jury trial, or to plead guilty." Id.

Justice Marshall then stated:

> "Thus, if pursuit of an insanity defense is a decision to be made by the accused, it must be done on the advice of a well-informed attorney who has assured that his client has based his decision on relevant information." Id. at 294.

In footnote five, Justice Marshall acknowledged:

> "Ethical Consideration 7-7 of the American Bar Association Code of Professional Responsibility suggests that the decision on an insanity defense might ultimately be one for the client, but that it must be made after the lawyer has fully informed himself and his client on the issue." Id. at 295 fn.5.

The language contained in the EC 7-7 under consideration by the justices is the same as the language used in the EC 7-7 adopted in Ohio. The remarks of Justice Marshall, joined by Justice Brennan, therefore indicate an acknowledgment that the power to make the decision regarding whether or not to enter a plea of not guilty by reason of insanity rests with the client.

We conclude, therefore, that once appellant was found competent to stand trial, he was also competent to make a decision regarding what plea to enter. Even if his trial counsel believed appellant's choice was not the best tactical choice, appellant's decision should have been final.[3] The trial court erred when it allowed appellant's appointed counsel to withdraw the plea of not guilty by reason of insanity even though appellant objected on the record.

A final issue to consider is appellee's contention that

even if error did occur, the error was harmless. Crim.R. 52(A) defines harmless error as:

> "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." (Emphasis added).

We cannot find that harmless error exists in this case, because the right of a defendant who is competent to stand trial, but who insists he was insane at the time of the crime, to choose what plea to enter is a substantial right.

As the Ninth District Court of Appeals for Ohio noted in State v. Turner (Sept. 17, 1980), Medina App. No. 963, unreported, prejudice occurs when a court allows trial counsel to withdraw a plea of not guilty by reason of insanity over a client's objection because the client is deprived "of the opportunity of presenting testimony relating to his chosen defense."

Id. The Ninth District Court of Appeals expounded further, stating:

> "In ruling as we do, we recognize that the psychiatric evidence elicited, if any, from the professionals contacted by defendant's attorney might well not be beneficial to defendant's cause. This fact, however, does not lessen defendant's right to enter his chosen plea. Factually, the testimony of the

> expert witnesses may not have been used at all; the defendant himself could have testified concerning his thought processes at the time of the incidents which gave rise to the indictments against him." Id.

We therefore conclude that in this case a breakdown occurred in the attorney-client relationship that was of such magnitude, appellant was deprived of the right to effective assistance of counsel. The trial court erred when it permitted trial counsel to make a decision that is reserved to a competent client; what plea will be entered to the charges brought against the client. The error affected a substantial right and is, therefore, not harmless. Appellant's first assignment of error is well-taken.

The remaining assignments of error are rendered moot by our disposition of the first assignment of error. The judgment of the Lucas County Court of Common Pleas is reversed, and this case is remanded for further proceedings consistent with this decision. Appellee is ordered to pay the court costs of this appeal.

JUDGMENT REVERSED.

State v. Tenace
L-95-010

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 7/1/92.

Peter M. Handwork, J.

George M. Glasser, J.

James R. Sherck, J.

CONCUR.

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1 The trial judge stated on the record that these findings from the report were admitted into the record. The report therefore contains the findings, but not the physical report, which was not marked as an exhibit or filed in the record.

2 Once again, the trial judge stated on the record that these findings from the report were admitted into the record. The report therefore contains the findings, but not the physical report, which was not marked as an exhibit or filed in the record.

3 ABA Standards for Criminal Justice Standard 4-5.2 indicates that when an attorney and a client have a disagreement on significant matters of tactic or strategy, the

lawyer should make a record of the differences and of the conclusion reached, while preserving confidentiality.

APPENDIX B

THE SUPREME COURT OF OHIO

		1997 TERM
State of Ohio, Appellant,	:	Case No. 97-1887
v.	:	ENTRY
Troy Matthew Tenace, Appellee.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Furtherance of Justice Fund.

(Lucas County Court of Appeals; No. L95010)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Filed Dec. 11, 1997

APPENDIX C

IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO

State of Ohio,	*	Case No.: 94-5235
	*	
Plaintiff,	*	Honorable Robert G. Christiansen
	*	
	*	
-vs-	*	
	*	
Troy Matthew Tenace	*	
	*	JUDGMENT ENTRY
	*	
Defendant.	*	

This cause has been tried by a jury of twelve upon a charge against the Defendant of Acgravated Murder, in that Defendant did purposely cause the death of Edward S. Kozlowski while in the commission of an Aggravated Robbery, and upon a Specification that the offense was committed while Defendant was committing Aggravated Robbery, and that the Defendant was the principal offender In the commission of the Aggravated Murder. At the conclusion of the trial the jury, being duly instructed as to the applicable law, deliberated and returned verdicts of guilty against Defendant as to both charges and the Specification.

The mitigation/sentencing phase of the trial was subsequently held so that the jury might give appropriate consideration to the matter of the penalty to be imposed for the offense of Aggravated Murder with the Specification. Following the mitigation/sentencing phase of the trial, the jury, again being duly instructed as to the applicable law, returned its finding that the aggravating circumstance of which Defendant was found guilty outweighs beyond a reasonable doubt the mitigating factors presented and further recommended to the Court the imposition of the death penalty for the Aggravated Murder and Specification proven.

The Court, upon due consideration of the recommendation of the jury, all evidence, arguments and other matters to be considered, has found and herewith rules that the aggravating circumstance of which the Defendant has been found guilty does, beyond any reasonable doubt, outweigh the mitigating factors shown in this case, and herewith ORDERS the Defendant be sentenced as hereinafter set forth.

Upon the offense of Aggravated Murder charged in the first count of the indictment, and upon the Specification

that the offense was committed while the Defendant, Troy Matthew Tenace, was committing Aggravated Robbery, and the Defendant, Troy Matthew Tenace, was the principal offender in the commission of the Aggravated Murder, the Defendant is sentenced to be put to death by electrocution in the manner and place directed by the provisions of R.C. 2949.22 and the Court hereby designates the date of Defendant's execution to be the 7th day of April, 1995, at 12:00 midnight.

The Defendant having been found guilty by the jury of Aggravated Robbery as charged in the second count of the indictment in violation of R.C. 291 1.01, being an aggravated first degree felony, is sentenced to serve in the custody and control of the Ohio Department of Rehabilitation and Correction the term of not less than ten nor more than twenty-five years.

In accordance with the law, the Court further ORDERS that the Defendant pay the costs of this prosecution.

It is now ORDERED that the Defendant be remanded to the custody of the Lucas County Sheriff for transportation to the Classification and Reception Center of the Ohio

Department of Rehabilitation and Correction in Orient, Ohio, and that from there he be promptly delivered to and received by the warden of the Lucasville Correctional Facility, a penitentiary facility of the aforesaid Department, there to be kept until the day of his execution, all for the purpose of carrying out the foregoing orders and sentences of the Court.

Defendant is advised of his automatic right of Appeal. Defendant is granted credit of 303 days of confinement.

Date: November 30, 1994

/s/ Robert G. Christiansen
Robert G. Christiansen, Judge

APPENDIX D

THE SUPREME COURT OF OHIO

		1998 TERM
State of Ohio, Appellant,	:	Case No. 97-1887
v.	:	RECONSIDERATION ENTRY
Troy Matthew Tenace, Appellee.	:	(Lucas County)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. L95010)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Filed Jan. 28, 1998

APPENDIX E

CONSTITUTIONAL PROVISIONS

U.S. CONSTITUTION: FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION: SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONSTITUTION: FOURTEENTH AMENDMENT

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United

States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the

United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F

STATE OF OHIO, Plaintiff-Appellee

vs.

ROBERT L. TURNER, Defendant-Appellant

No. 963

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, MEDINA COUNTY

Slip Opinion

September 17, 1980

CASE STATUS: * PURSUANT TO RULE 2(G) OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, UNPUBLISHED OPINIONS MAY BE CITED SUBJECT TO CERTAIN RESTRAINTS, LIMITATIONS, AND EXCEPTIONS.

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT, MEDINA COUNTY, OHIO, CASE NOS. 6536, 79 CR 0210

COUNSEL

Roger R. Ingraham, Prosecuting Attorney, for Plaintiff-Appellee

Lawrence J. Cook, Attorney at Law, for Defendant-Appellant

JUDGES

BELL, P.J., VICTOR, J., HUNSICKER, J., CONCUR

(Hunsicker, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Article IV, § 6(C), Constitution).

AUTHOR: BELL

OPINION

DECISION AND JOURNAL ENTRY

This cause was heard August 15, 1980, upon the record in the trial court, including the transcript of proceedings, and the briefs. Oral argument was waived by counsel for the parties and the matter was submitted to the court. We have reviewed each assignment of error and make the following disposition:

BELL, P.J.

Appellant Turner, defendant below, seeks now to overturn the guilty verdicts returned against him by a trial jury.

After the filing of defendant's notice of appeal in this court, counsel was appointed and thereafter filed with us his brief containing three assignments of error. With the consent of this court, four additional claims of error were filed by defendant himself. We have considered the arguments advanced in each of those briefs as well as those of the state. We set forth here the composite claims of error:

"1. The trial court erred in refusing to permit the appellant to maintain his plea of not guilty by reason of insanity.

"2. The trial court erred in refusing to allow the appellant to recall certain prosecution witnesses.

"3. The trial court erred in failing to consolidate counts in the indictment based upon the facts and evidence adduced at trial, and further erred in entering judgments of guilty and in sentencing the appellant to consecutive terms of incarceration.

"4. The trial court erred in appointment of counsel.

"5. Ineffective counsel.

"6. The court erred in excluding appellant from courtroom.

"7. The court erred in not returning appellant to courtroom before giving further instructions to the jury on matters of law."

We reverse the judgments rendered in the trial court and remand for further proceedings.

Inasmuch as our attention in this opinion is confined to the proceedings which took place during the course of trial, we have no need to discuss those facts which lead to defendant's arrest and indictment.

The record before us on review reveals clearly the difficulties experienced during trial by the court, both counsel for the state and defense, and the defendant himself. The patience exhibited by the trial judge, in attempting to assure justice to the defendant, is marked in its contrast to defendant's attempts to delay and obstruct the legal process of evidential development. The final product of these two views of the trial process obviously contributed to frustration on both sides of the bench.

Aside from that observation, we turn to an issue critical to our determination of defendant's appeal. May counsel, as he did here, waive or withdraw defendant's plea of not guilty by reason of insanity over the objection of defendant himself?

As a brief background relating to this question, we note first

that when the defendant initially appeared before the bench for arraignment, pleas of not guilty were entered on his behalf, first by the trial judge and subsequently by appointed counsel. In each instance, defendant's right to enter a further plea of not guilty by reason of insanity was reserved. At the beginning of trial and at the request of defendant, that plea was advanced by a formal written plea of not guilty/not guilty by reason of insanity which was filed by defendant's counsel. We note that defendant himself requested that such a plea be entered even though, as he suggested, such action was contrary to the advice of his attorney (T.O.P. I, 13).

Immediately after allowing the introduction of the requested plea, the trial court ordered defendant's attorney to arrange for the necessary psychiatric and psychological tests required. Counsel, thereafter, reported to the court that he secured the results of those tests saying, in part:

"* * *.

"Also for the record, the plea of not guilty by reason of insanity, we will not go forward on the same based on the clinical and medical reports submitted today. We will, however, go forward on the plea of not guilty."

"* * *." (T.O.P. I, 34).

The trial judge:

"* * * will accept the defendant's motion to waive the defense of not guilty by reason of insanity and proceed with the trial."

"* * *." (T.O.P. I, 35).

At this point, a lengthy discussion ensued, beginning with defendant contending that his attorney should be replaced (for a number of reasons) and concluding with defendant's stating that while he was not presently insane, he was at the time of the alleged crime, "acting in a manner I (he) didn't feel was sufficient at the time."

We must regard this dialogue as an objection by defendant to the "waiver" of the insanity defense, particularly when it is read in conjunction with later statements made by him on that subject. It is of no benefit here to repeat the many comments made concerning the abandonment of the plea in question; it is sufficient to note that the plea was the subject of discussion throughout the pages of the transcripts of proceedings: Vol. I: 9, 10, 12-18, 22-26, 33-37, 43-44, 47, 62; Vol. II: 322, 327-329, 334, 335, and 339. A reading of this record makes it obvious

that defendant did not agree with counsel's "waiver" of the plea.

The entering of any plea to the charges contained in an indictment is a fundamental act reserved to the province of defendant himself. It is always hoped that, after a full and complete discussion of the issues involved - both factual and legal, the defendant considers the historic role of the attorney as counselor and enters that plea not only most protective of his rights but reflective of the posture of the case against him. But in those instances where counsel's advice is rejected, the accused preserves always his right to risk the eventual verdict of court or jury and any punishment inflicted upon him as a result. It is his right to determine the primary question posed to him at arraignment: "Shall I plead guilty, not guilty (and if the latter plea might raise also the question of my own mental culpability at the time of the commission of the crime with which I am charged) not guilty by reason of insanity? The professional duty of counsel in this sphere is to present defendant those choices available, to explain their meanings, and then, to abide by his client's choices. Defense counsel cannot decide himself the path to be chosen; he cannot waive one or more of the defenses once chosen by his client, or withdraw one or more of

the pleas entered, without the consent of the person he represents.

In the instant cause, we must hold that error was committed when, without the acquiescence of defendant, counsel withdrew the plea of not guilty by reason of insanity. We utilize here the word "withdrew" in this connection as opposed to the word "waive" since the written plea was placed before the court previous to counsel's statement.

Further, we are required to hold that the error committed was prejudicial to defendant, depriving him, as it did, of the opportunity of presenting testimony relating to his chosen defense.

In ruling as we do, we recognize that the psychiatric evidence elicited, if any, from the professionals contacted by defendant's attorney might well not be beneficial to defendant's cause. This fact, however, does not lessen defendant's right to enter his chosen plea. Factually, the testimony of the expert witnesses may not have been used at all; the defendant himself could have testified concerning his thought processes at the time of the incidents which gave rise to the indictments against him.

We, thus, reverse the judgments below and remand this cause to the trial court for further proceedings in accordance with this opinion.

Retrial proceedings make moot the claims of error raised in assignments 2, 4, 5, 6, and 7. We find no request on behalf of defendant that certain counts of the indictment be eliminated or combined for trial, no objection to the jury verdict forms as to the charges pertaining to the separate counts. Though we feel that assignment of error 3 is moot in view of our ruling above, we add that it appears that the issue presented therein is first raised here and is without merit in the manner presented.

The judgment is reversed and remanded.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Medina County Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R.

22(E).

Costs taxed to appellee.

Exceptions.